RENGANATHAN NARAYANAN *a*

v.

BAN LEE SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR *b*
ABDUL KADIR SULAIMAN J
[CIVIL APPEAL NO: R1-4-16-95]
24 JANUARY 1997

CIVIL PROCEDURE: *Appeal - Memorandum of - Service - Whether must be filed and served separately - Whether can be included in bundle meant for record of appeal - Rules of the High Court 1980, O. 55 rr. 2(1) & (2), 3, 4(3) - Subordinate Courts Rules, O. 49 rr. 2(4), 3, 3A & 6(3)* *c*

The appellant brought a claim against the respondent for payment in respect of his overtime work, annual leave, public holidays, rest days and excess Employees' Provident Fund ('EPF') contributions under s. 69 of the Employment Act 1955. The Labour Officer allowed part of his claim for payment of annual leave, rest days and public holidays but dismissed the claim for overtime work and excess EPF contributions. The appellant appealed against the dismissal of his claim for overtime work amounting to RM20,324.88. At the hearing of the appeal, counsel for the respondent raised a preliminary objection regarding the manner in which the memorandum of appeal was served on the respondent as it was not filed and served separately from the record of appeal but was included in the bundle meant for the record of appeal, and submitted that the appeal should be dismissed pursuant to O. 55 r. 4(3) of the Rules of the High Court 1980 ('the RHC'). *d* *e* *f*

Held:

[1] By O. 55 r. 2 of the RHC the memorandum of appeal is required to be filed and served within 14 days from the date of service on the appellant of the notice in Form 141 under O. 49 r. 2(4) of the Subordinate Courts Rules 1980 ('the SCR'), whereas by O. 49 r. 3A(3) and (4) of the SCR, the record of appeal is required to be filed and served within six weeks of the receipt of the notification in Form 141. Therefore, in practical terms, the memorandum of appeal must be filed well ahead of the record of appeal unless the appellant chooses to file the record of appeal together with the memorandum of appeal. *g* *h*

[2] Although the rules do not clearly state whether the memorandum of appeal can be included in the bundle meant for the record of appeal, the court was of the view that it was not fatal to do so provided the memorandum of appeal was truly a memorandum of appeal. A true memorandum of *i*

appeal does not form a part of the appeal record because an appeal record contains documents enumerated by O. 49 r. 3(1) or 3A(1) of the SCR whereas the memorandum of appeal contains the grounds of appeal.

[3] As the memorandum of appeal here was served within the time stipulated by O. 55 r. 2 of the RHC and it was a true memorandum of appeal, it could be incorporated into the bundle meant for the record of appeal.

[Preliminary objection dismissed.]

Cases referred to:
Samsuri bin Saad & Anor v. Chew Kit Toh (t/a Kit Thong Who Hup) and Another Appeal [1996] 2 CLJ 109 ***(dist)***
Shobri bin Hasan v. Ramalingam [1993] 3 CLJ 070 ***(dist)***
Siang Galau v. Ang Wak Hiong [1994] 1 CLJ 82 ***(dist)***

Legislation referred to:
Employment Act 1955, s. 69
Rules of the High Court 1980, O. 55 rr. 2(1), (2), 3, 4(3)
Subordinate Courts Rules 1980, O. 49 rr. 2(4), 3(1), (2), 3A(1)(a), (3), (4), 6(3)

For the appellant - Mohan Ghandi; M/s Mohan Ghandi & Assoc
For the respondent - Kamaleswari Shanmugam Chettiar; M/s David Lingam & Co

Reported by Anne Khoo

JUDGMENT

Abdul Kadir Sulaiman J:

Before the Labour Court, the appellant claimed under s. 69 of the Employment Act 1955 against the respondent for payment in respect of his overtime work, annual leave, public holidays, rest days and excess of his EPF deductions. The Labour Officer by his order of 26 August 1993 dismissed the claim for overtime work and excess EPF deductions but allowed his claim for payment of annual leave, rest days and public holidays but not to the full extent claimed. The appellant by his notice of appeal filed on 7 September 1993, appealed only against the decision disallowing his claim in respect of payment for overtime work amounting to RM20,324.88.

Form 141 under O. 49 r. 2(4) of the Subordinate Courts Rules 1980, (hereinafter referred to as 'the SCR') dated 25 March 1995 notifying the appellant that a certified copy of the notes of evidence and the judgment are ready, was given to the appellant. On 1 April 1995 the appellant filed his record of appeal and on 3 April 1995 had it served on the respondent. In the said record of appeal is included the memorandum of appeal. His appeal was

scheduled for hearing on 31 October 1996. At the commencement of the hearing of the appeal the respondent through his Counsel raised a preliminary objection on the manner the memorandum of appeal was served on the respondent. It is not in dispute that the "record of appeal" was filed and served within the time allowed for the filing of the memorandum of appeal and well ahead of the six weeks period allowed for the filing and service of the record of appeal pursuant to O. 49 r. 3A(3) and (4) of the SCR. However, as the memorandum of appeal was not filed and served separately from the record of appeal but instead being included in the bundle meant for the record of appeal, the learned Counsel for the respondent prayed for the appeal to be dismissed pursuant to O. 55 r. 4(3) of the Rules of the High Court 1980, (hereinafter referred to as 'the RHC'). The said subrule states:

> O. 55 r. 4(3) If the memorandum of appeal is not filed or is not served within the prescribed time and no sufficient ground is shown for the delay the appeal may be dismissed.

Here, as stated earlier the memorandum of appeal was filed and served within time except for the fact that it being included in the record of appeal instead of it being filed and served separately. Order 55 r. 2 of the RHC requires that a memorandum of appeal must be filed and served within 14 days from the date of service on the appellant of the notice in Form 141 which in this case must be so done by 7 April 1995 as the said notice in Form 141 was dated 25 March 1995. It is not known however, when the said notice was actually served on the appellant. The learned Counsel merely informed the court that it was dated 25 March 1995. However, in this case, as mentioned earlier, the memorandum of appeal was filed on 1 April 1995 and served on 3 April 1995, which is well before the expiry of the period allowed by O. 55 r. 2 of the RHC, except for the fact that it being included in the record of appeal instead of it being filed and served separately.

The learned Counsel for the respondent first relied on *Shobri bin Hasan v. Ramalingam* [1993] 1 MLJ 263. In that case, the memorandum of appeal was similarly included in the record of appeal bundle and was filed and served. However, on its own, the memorandum of appeal was filed and served out of the time period allowed. The contention of the respondent there was that the filing and the service of the memorandum of appeal being out of time no leave of court was obtained. The court dismissed the appeal because the memorandum of appeal was not filed within the prescribed time, and no sufficient ground was shown for the delay and there was no application for enlargement of time to file the same. So that case cited has no relevance to the instant case as here, it is not disputed that the memorandum of appeal though being put in the bundle meant for the record of appeal, it was filed

and served in the proper time. By way of *obiter dicta* the learned JC (as he then was) said at p. 269:

> It must be stressed here that the memorandum of appeal does not form part of the appeal record. The memorandum of appeal must be filed separately and served on the respondent. Once filed, the High Court will be notified of the grounds of appeal which the appellant proposes to rely upon at the hearing of the appeal. In turn this would also enable the respondent to garner his points and prepare fully for the hearing at the High Court and if need be, to file his cross-appeal. In short the respondent will be alerted and not be caught off guard at the hearing in the High Court.

In respect of appeals to the High Court from the decisions made after trial by the subordinate courts, by an appellant who is represented by a solicitor, the appellant is required to prepare requisite number of copies of the appeal record. What to constitute the appeal records is enumerated in O. 49 r. 3A(1)(a) to (f) of the SCR. Two copies of the appeal record prepared are required to be filed in the High Court and one copy each is required to be served on each party who has been served with the notice of appeal. The filing and the service of the appeal record must be done within six weeks of the receipt of the notification by means of Form 141 from the court appealed from. The SCR does not spelt out the time period for the filing of any memorandum of appeal and for that matter does not mention anything about it at all except when it comes to the appeal against the decision made by the court below other than a decision made after trial, where by O. 49 r. 6(3) thereof the memorandum of appeal is expressly to be excluded from the record of appeal filed and served in such cases. The memorandum of appeal comes in only in pursuance to O. 55 of the RHC when dealing with appeals from subordinate courts and statutory bodies. By r. 2 of O. 55 the appellant is required to file in the High Court in duplicate and to serve on each respondent with a copy of the memorandum of appeal. The filing and the service of the memorandum of appeal must be done within fourteen days from the date of service on the appellant of the notice in Form 141 under O. 49 r. 2(4) or r. 3(2) of the SCR. So, up to this point, it is clear that whilst by O. 49 r. 3A(3) and (4) of the SCR the appeal record must be filed and served within six weeks of the receipt of the notification in Form 141, by O. 55 r. 2 of the RHC the memorandum of appeal must be filed and served within fourteen days from the date of service on the appellant of the notice in Form 141 of the SCR. So, in practical term, the memorandum must be filed and served well ahead of the filing and serving of the appeal record unless an appellant chooses not to utilise the six weeks period given to it to file his appeal record but to do so together with the filing and serving of the memorandum of appeal within the fourteen days given. Again up to this point it is still not clear whether the memorandum of

appeal can be included in the bundle meant for the appeal record where an appellant chooses to file and serve both at the same time. But if we go on to look at O. 55 r. 2(2) of the RHC, it is required that a copy of the appeal record must be served on each respondent within fourteen days from the date of service of the notice in Form 141 of the SCR. This provisions is clearly in conflict with O. 49 r. 3A(4) of the SCR where the appellant is given six weeks to do so. Be that as it may, it is my view that it is not fatal if the memorandum of appeal is included in the bundle meant for appeal record provided it is truly a memorandum of appeal and the filing and the service of both are done within the time period allowed by the rules of court. A memorandum of appeal truly does not form part of the appeal record because of the individual content and nature. Whilst an appeal record contains documents enumerated in O. 49 r. 3(1) or r. 3A(1), as the case may be, the memorandum of appeal contains grounds for the appeal. In the instant appeal, it is conceded by the learned Counsel for the respondent that the one found in the bundle meant for the appeal record is indeed a memorandum of appeal. In this respect I beg to differ from the view expressed by my learned brother in the *dicta* quoted above in *Shobri bin Hasan v. Ramalingam*, *supra*, for requiring the memorandum of appeal to be filed separately and served on the respondent, *inter alia*, so as to alert the respondent not be caught off guard at the hearing. If the memorandum of appeal is to be filed and served at all it must be done within fourteen days from the date of service of the notice in Form 141 of SCR: see O. 55 r. 2(1) and (2) of the RHC. So, it is the filing and service within the time prescribed that is important unless leave obtained to do so out of time. So long at it is so done, to my mind, it does not matter whether it is done separately from the appeal record or through its incorporation in the record of appeal in instance where the appellant chooses to file its record of appeal earlier than the time of six weeks permitted. If an appellant chooses to incorporate the memorandum in the record of appeal bundle and have it filed and served only beyond the fourteen days and no prior leave to do so beyond the time is given, the respondent can apply under O. 55 r. 4(3) of the RHC to have the appeal dismissed on that ground. As to the fear that the respondent may not be able to file his cross-appeal, there would be no prejudice caused because by O. 55 r. 3 of the RHC time would run against the respondent only from the moment the memorandum of appeal is served on him.

Coming back to the instant case concerning the preliminary objection raised by the respondent, the learned Counsel next cited *Siang Galau v. Ang Wak Hiong* [1994] 1 CLJ 82 in asking that this appeal by the appellant be dismissed because the memorandum of appeal was included in the record of appeal. In that case, the issue before the court was whether the provisions of the rules

of court required the filing and service of the memorandum of appeal within 14 days from the date of service of Form 141 on the appellant through his advocate. The court answered in affirmative in the light of O. 55 r. 2(1) and (2) and dismissed the appeal because the memorandum of appeal was filed and served after the expiration of the fourteen days without leave being sought for extension of time for such late filing and service. *Siang Galau*, *supra*, does not decide that the memorandum of appeal and the record of appeal must be filed separately. In fact that case pointed out the inconsistency in O. 55 r. 2(2) of the RHC with O. 49 r. 3A(4) of the SCR relating to the service of the appeal record.

Lastly, the learned Counsel for the respondent pointed out *Samsuri bin Saad & Anor. v. Chew Kit Toh (t/a Kit Thong Who Hup) and another appeal* [1996] 1 MLJ 576. In that case too, the memorandum of appeal was incorporated in the bundle meant for record of appeal. The respondent contended that as such the memorandum of appeal was never served on them as required by O. 55 r. 2 of the RHC. The learned judge referred to the headnote as appeared in his own decision in *Shobri bin Hasan*, *supra*, as reported in [1993] 3 CLJ 70, *inter alia*, that the memorandum of appeal does not form part of the appeal record and must be filed separately within 14 days after the service on the appellant's solicitor, of the notes of evidence and the grounds of judgment by the Subordinate Courts and served on the respondent. Relying support from *Siang Galau*, *supra*, the learned judge dismissed the appeal without the need to go into the merits of the appeal. However, it is not disclosed in the report whether, the said memorandum of appeal was filed and served in time pursuant to O. 55 r. 2 of the RHC apart from the contention by the respondent that it was not served on them but instead the said memorandum was incorporated in the record of appeal. However, as stated earlier *Siang Galau*, *supra*, does not decide that the memorandum of appeal must be filed separately from the record of appeal.

For the above reasons, I hold the view that the memorandum of appeal does not form part of the appeal record. Each has its own time for the filing and the service. Under normal circumstances, the memorandum of appeal must be filed and served earlier than the record of appeal. But it is proper for the record of appeal to be filed and served earlier than the time allowed for it to be done for it would then be still within the time range allowed. The record of appeal may be filed and served simultaneously with the memorandum of appeal within the time allowed for the filing of the memorandum of appeal. Provided that it is a proper memorandum of appeal, it may be incorporated in the bundle meant for the record of appeal and both filed and served within the time allowed for the filing of the memorandum of appeal.

In the circumstances, in the instant case, as the document incorporated in the record of appeal bundle is a proper memorandum of appeal as so conceded by the respondent and that it was filed and served within the time allowed for it to be done, the preliminary objection must fail and be disallowed. The hearing of the appeal by the appellant must proceed for the purpose of determining its merit and a date for such hearing be fixed immediately.